Office - Supreme Court, U.S.
FILED
DEC 1 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1681

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

VILLAGE OF HOFFMAN ESTATES
ILLINOIS, et al.

Appellants,

vs.

THE FLIPSIDE, HOFFMAN ESTATES
INC., an Illinois Corporation

Appellees.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE APPELLANTS

RICHARD N. WILLIAMS
Village Attorney
1200 North Gannon Drive
Hoffman Estates, IL 60196
(312) 885-8110

November, 1981

APPEAL DOCKETED APRIL 3, 1981
PROBABLE JURISDICTION NOTED JUNE 1, 1981
ORAL ARGUMENT SCHEDULED DECEMBER 9, 1981

TABLE OF CONTENTS

	PAGE
Table of Authorities	ii
Additional Constitutional Provisions, Statutes and Ordinances Involved	iii
Prefatory Note	1
A. Subsequent Legislative Enactment by the Illinois General Assembly	1
B. Severability Clause	3
Argument:	
I. There Is No First Amendment Issue	4
II. There Is Sufficient *Nexus* Between the Items and Illegal Drug Use	6
III. The Merchant's State of Mind Is Relevant	6
Conclusion	13
Appendix	1a

TABLE OF AUTHORITIES

PAGE

Casbah, Inc. v. *Thone*, 651 F. 2d 551 (C. A. 8th, 1981) 5

Bigelow v. *Virginia*, 421 U. S. 809, 95 S. Ct. 2222 (1975) 5

Brache v. *County of Westchester*, 507 F. Supp. 566 (S. D. N. Y., 1981) 6

Cardarella v. *City of Overland Park*, 620 P. 2d 1122 (1980) 6

Central Hudson Gas Corp. v. *Public Service Commission*, 447 U. S. 557, 100 S. Ct. 2343 (1980) 5

Danovitz v. *United States*, 281 U. S. 389, 50 S. Ct. 344 (1930) 8

Direct Sales Company v. *United States*, 319 U. S. 203, 63 S. Ct. 1265 (1943) 8

Franza v. *Carey*, 518 F. Supp. 324 (S. D. N. Y., 1981) 10

Gasser v. *Morgan*, 498 F. Supp. 1154 (N. D. Ala., 1980) 11

Lady Ann's Oddities, Inc. v. *Macy*, 519 F. Supp. 1140 (W. D. Okla., 1981) 5, 11

Music Plus Four, Inc. v. *Barnet*, 170 Cal. Rptr. 2119 (Cal. App., 1980) 12

NORML v. *Sendak*, TH 75-142-C (S. D. Ind., 1980), Appendix of unreported opinions—37a ... 11

Record Revolution No. 6 v. *City of Parma*, 638 F. 2d 916 (C. A. 6th, 1980) 4, 11

Rozner v. *Korshak*, 303 N. E. 2d 389 (Ill., 1973) 2

Virginia State Board of Pharmacy v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 96 S. Ct. 1817 (1976) 5

ADDITIONAL CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

Public Act 82-847

AN ACT providing protection for the public health and safety by prohibiting the sale or delivery of tobacco accessories or smoking herbs to minors.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. This Act shall be known and may be cited as the "Tobacco Accessories and Smoking Herbs Control Act".

Section 2. Purpose. The sale and possession of marijuana, hashish, cocaine, opium and their derivatives, is not only prohibited by Illinois Law, but the use of these substances has been deemed injurious to the health of the user.

It has further been determined by the Surgeon General of the United States that the use of tobacco is hazardous to human health.

The ready availability of smoking herbs to minors could lead to the use of tobacco and illegal drugs.

It is in the best interests of the citizens of the State of Illinois to seek to prohibit the spread of illegal drugs, tobacco or smoking materials to minors. The prohibition of the sale of tobacco and snuff accessories and smoking herbs to minors would help to curb the usage of illegal drugs and tobacco products, among our youth.

Section 3. Definitions. The following definitions shall apply to this Act: (a) "Tobacco accessories" shall mean cigarette papers, pipes, holders of smoking materials of all types, cigarette rolling machines, and other items, designed

primarily for the smoking or ingestion of tobacco products or of substances made illegal under any statute or of substances whose sale, gift, barter, or exchange is made unlawful under this Act.

(b) "Smoking herbs" shall mean all substances of plant origin and their derivatives, including but not limited to broom, calea, California poppy, damiana, hops, ginseng, lobelia, jimson weed and other members of the Datura genus, passion flower and wild lettuce, which are processed or sold primarily for use as smoking materials.

Section 4. Offenses. (a) Sale to Minors. No person shall knowingly sell, barter, exchange, deliver or give away or cause or permit or procure to be sold, bartered, exchanged, delivered, or given away tobacco accessories or smoking herbs to any person under eighteen years of age.

(b) Use of Identification Cards. No person in the furtherance or facilitation of obtaining smoking accessories and smoking herbs shall display or use a false or forged identification card or transfer, alter or deface an identification card.

(c) Warning to Minors. Any person, firm, partnership, company or corporation operating a place of business wherein tobacco accessories and smoking herbs are sold or offered for sale, shall post in a conspicuous place upon the premises a sign upon which there shall be imprinted the following statement, "SALE OF TOBACCO ACCESSORIES AND SMOKING HERBS TO PERSONS UNDER EIGHTEEN YEARS OF AGE OR THE MISREPRESENTATION OF AGE TO PROCURE SUCH A SALE IS PROHIBITED BY LAW". Such a sign shall be printed on a white card in red letters at least one-half inch in height.

Section 5. Penalty. Any person who shall knowingly violate, or shall knowingly cause the violation of any provision of this Act shall be guilty of a Class C misdemeanor.

GEORGE H. RYAN SR.
Speaker, House of Representatives

PHILIP J. ROCK
President of the Senate

APPROVED
this 15th day of September, 1981 A.D.

JAMES R. THOMPSON
Governor

* * *

HOFFMAN ESTATES MUNICIPAL CODE

Section 1-1-9—Severability of Parts of Code.

The sections, paragraphs, sentences, clauses and phrases of this code are severable, and if any phrase, clause, sentence, paragraph or section of this code shall be declared unconstitutional, invalid or unenforceable by the valid judgment or decree of a court of competent jurisdiction, such unconstitutionality, invalidity or unenforceability shall not effect any of the remaining phrases, clauses, sentences, paragraphs and sections of this code.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

VILLAGE OF HOFFMAN ESTATES
ILLINOIS, et al.

Appellants,

vs.

THE FLIPSIDE, HOFFMAN ESTATES
INC., an Illinois Corporation

Appellees.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF AND ARGUMENT FOR THE APPELLANT

Prefatory Note

A. Subsequent Legislative Enactment by the Illinois General Assembly

On September 15, 1981, House Bill 1632, the "Tobacco Accessories and Smoking Act" was signed into law to be effective January 1, 1982. The Act has no applicability to the Village of Hoffman Estates or the subject ordinance.

A "Model Act" form known as the "Drug Paraphernalia Control Act" was originally proposed in the Illinois General Assembly. It included the clause: "The authority granted under

this subsection shall extend to all units of local government whether home-rule or non home-rule". This clause was deleted in the bill that was passed.

The effect of the deletion under Illinois law is to *not* extend the "Tobacco Accessories and Smoking Herbs Control Act" to home-rule municipalities. Hoffman Estates, with a population of over 38,000 is and has been since home-rule was created by the 1970 Illinois Constitution, a home-rule municipality. The Illinois Supreme Court has made it very clear that the General Assembly must expressly declare that a law applies to a home-rule municipality. The Court said in *Rozner* v. *Korshak*, 303 N. E. 2d 389 (Ill., 1973) at 391-392:

> "While Section 6(q) of Article VII authorizes the General Assembly, by a law approved by three-fifths of the members of each house, to deny or limit the power of a home-rule unit, it does not follow that every statute relating to the powers of municipalities generally will, if adopted by a three-fifths vote, have a bearing upon the powers of those municipalities which are home-rule units. The powers which those units have received under Section 6 of Article VII of the Constitution of 1970 are in addition to the powers heretofore or hereafter granted by the General Assembly to other municipalities. The kind of inadvertent restriction of the authority of home-rule units for which the plaintiff contends can be avoided if statutes that are intended to limit or deny home-rule powers contain an express statement to that effect. The statute before us contains no indication of a restrictive purpose, and we hold that it had no restrictive effect."

Counsel for Appellee concurs that the elimination of the specific applicability to home rule units in House Bill 1632 limits the applicability House Bill 1632 to non home-rule municipalities.

B. Severability Clause

The subject ordinance is part of a Municipal Code. The ordinance itself does not contain a severability clause because such clause is contained in the Hoffman Estates Municipal Code at Section 1-1-9 (page v). This clause has applicability to all codified ordinances.

ARGUMENT

I. There Is No First Amendment Issue

The Appellee, Flipside, has interjected First Amendment issues in its argument (Brief and Argument for the Appellee, pages 25-26) which are not part of the Question Presented. Appellant argues that First Amendment issues are appropriate since the standard of review may be effected. The United States District Court rejected the First Amendment applicability argument since the ordinance did "not purport to prohibit advertisement or the expression of commercial ideas" (Juris. St. at 40a). The United States District Court did nonetheless consider, *arguendo*, that "marketing" is a form of advertising and found that licensing would be a reasonable regulation of commercial speech (Juris. St. at 41a). The United States Court of Appeals did not reach the First Amendment issue and expressed no opinion (Juris. St. at 26a).

The "Model Act" has been found violative of the First Amendment because of a broad advertising restriction embodied in the "Model Act" in one Circuit opinion. The issue was discussed in *Record Revolution No. 6* v. *City of Parma*, 638 F. 2d 916 (C. A. 6th, 1980), at page 937:

> "The cities can legitimately protect their citizens from the use, sale or manufacture of 'drug paraphernalia' within city limits. However, an impenetrable wall against the free flow of commercial speech cannot be erected around the cities' residents. The cities' interest in regulation of advertising is limited to preventing the sale of drug paraphernalia inside their municipal boundaries. Their legitimate interest does not include regulating the information heard or read by their citizens about the availability of legal 'drug paraphernalia' in other locales."

No such limitation on advertising is contained in the subject ordinance.

In a test of Oklahoma's "Model Act", the Court recognized that the Legislature deleted the advertisement prohibition and said:

> "Commercial speech has been defined alternately as 'expression related solely to the economic interests of the speaker and its audience', and 'speech proposing a commercial transaction'. See *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U. S. 557, 561 562 100 S. Ct. 2343, 2349, 65 L. Ed. 2d 341 (1980). In the present case, the Act bans the sale and possession of items used or intended for the use with controlled dangerous substances. However, the legislature deleted the provisions of the Model Act prohibiting the advertisement and promotion of 'drug paraphernalia.' " *Lady Ann's Oddities, Inc.* v. *Macy*, 519 F. Supp. 1140 (W. D. Okla., 1981) at 1157.

The Nebraska "Model Act" retained the advertising prohibitions but the Eighth Circuit, after considering *Central Hudson Gas Corp.* v. *Public Service Commission*, 447 U. S. 557, 10 S. Ct. 2343 (1980), *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 96 S. Ct. 1817 (1976) and *Bigelow* v. *Virginia*, 421 U. S. 809, 95 S. Ct. 2222 (1975) concluded that advertising promoting the sale of drug paraphernalia is not protected speech. *Casbah, Inc.* v. *Thone*, 651 F. 2d 551 (C. A. 8th, 1981).

That advertising promoting illegal activity is not protected speech is clear but Appellee's argument extends itself to the display of items. The display is the key factor in the determination of "marketing for use" in the subject ordinance. If "display" is to be considered First Amendment expression, then it is not protected expression since it now is commercial expression promoting illegal activity.

The United States District Court in New York found a "Model Act" ordinance vague but discussed First Amendment issues. The ordinance deleted advertising but included the "Model Act" factors such as "national and local advertising

concerning its use" and the "manner in which the object is displayed". The Court found on the First Amendment challenge "no basis to consider it". *Brache* v. *County of Westchester*, 507 F. Supp. 566 (N. Y. 5th, 1981); reversed on standing issue, ___ F. 2d ___ (C. A. 2d—Case No. 81-2711, 1981), at 584.

The issue of "display" of drug paraphernalia as a First Amendment exercise was discussed by the Supreme Court of Kansas in *Cardarella* v. *City of Overland Park*, 620 P. 2d 1122 (1980). They said of "display" at page 1132:

> This is not commercial advertising—only the physical placement of items on the business permises is involved. This is not commercial speech. The only case dealing with this issue that has been located is *Tobacco Road* v. *City of Novi*, 490 F. Supp. 537 (E. D. Mich., 1980), which reaches this same result at 544-545. We must conclude the ordinance does not violate any First Amendment right of commercial speech."

"Display" which is a "Model Act" factor has not been considered for First Amendment protection by any Court hearing such cases and should not be an issue here since it is not an issue before the Court.

II. There Is Sufficient *Nexus* Between the Items and Illegal Drug Use

The Appellee's Brief discusses contraband *per se* and derivative contraband. The second "WHEREAS" of the subject ordinance recognizes the items as legal retail items and in no manner declares such items contraband or provides for seizure for possession or sale of such items. It is conceded that by design intent or marketing intent, the items become the subject of licensing by their now presumed derivative use. The analogies to prove this logical and rational presumption are not unlike the evidence used to prove derivative contraband (burglar tools, gambling devices, bootlegging implements, and the like) in criminal cases.

At page 3 and 4 of Appellee's Brief, four situations are discussed where the *nexus* requirement has been met to establish that a neutral tool may be inferred to be a burglar tool. Appellant Village does not deny that a *nexus* must be met to demonstrate that items "are more likely than not" to be used with illegal drugs. The Village did in fact present evidence that items of the type marketed at Flipside were being primarily used with illegal drugs (J. A. 51-52).

In the common experience of man, it is naive and illogical to make any other conclusion but that items of the type presented as exhibits and marketed together by Flipside are intended for any use other than illegal drugs. They are, therefore, derivatively subject to licensing as drug paraphernalia.

At page 9 of Appellee's Brief, they said:

> "Burdening lawful objects with the label of 'instrumentality of crime' without first establishing the criminal *nexus* is unprecedented in the law and can find no support in the other forms of 'paraphernalia' laws discussed herein. It is obvious that no merchant of crow bars or copper tubing could allege standing to challenge as facially vague a burglary tool statute or a bootlegging paraphernalia statute without first being subject to prosecution."

We disagree with this premise. If in fact the retailer promoted his crow bars with literature on how to break into homes, displayed it with lock picks, alarm diverters and construction diagrams, it would be naive and illogical to make any other conclusion but that the items had now become derivative contraband. The *nexus* can be made in drug paraphernalia and burglar tools in numerous ways but in this case, we are dealing with a retailer and the evidence of *nexus* must be determined in the retail setting and marketing choice made by the retailer.

The retail analogy that Appellee rejects was upheld in *Danovitz* v. *United States*, 281 U. S. 389, 50 S. Ct. 344 (1930) where forfeiture of the Feitler Bottle Company's contraband under the National Prohibition Act was upheld. Justice Holmes said of "manufacture" and the method of sale at 281 U. S. 396, 397:

> "The argument for the petitioner cannot be helped by amplification. It is obviously correct if the word 'manufacture' be taken in the strictest and most exact sence. But the word may be used in a looser way to express the whole process by which an article is made ready for sale on the open market. . . . We are of opinion that the word was used in this looser way, and that if the empty containers and the other objects seized were offered for sale in such a mode as purposely to attract purchasers who wanted them for the unlawful manufacture, as we interpret the word, they were designed for that manufacture and could be seized.

A case with application here is *Direct Sales Co.* v. *United States*, 319 U. S. 703, 63 S. Ct. 1265 (1943). In that case, defendant, a registered drug manufacturer and wholesaler, claimed that its mere sale of narcotics to a physician was insufficient evidence of conspiracy to sell narcotics outside the legitimate practice of the profession. Direct Sales was convicted as the Court found that legal narcotics could become illegal narcotics if a *nexus* could be proved beyond a reasonable doubt that legal items were being put to illegal use. The Court said at 319 U. S. 710:

> "All articles of commerce may be put to illegal ends. But all do not have inherently the same susceptibility to harmful and illegal use. Nor, by the same token, do all embody the same capacity, from their very nature, for giving the seller notice the buyer will use then unlawfully. Gangsters, not hunters or small boys, comprise the normal private market for machine guns. So drug addicts furnish the normal outlet for morphine which gets outside the restricted channels of legitimate trade."

and at 319 U. S. 711:

> "Additional facts, such as quantity sales, high pressure sales methods, abnormal increases in the size of the buyer's purchases, etc., which would be wholly innocuous or not more than ground for suspicion in relation to unrestricted goods, may furnish conclusive evidence, in respect to restricted articles, that the seller knows the buyer has an illegal object and enterprise.

The *nexus* in the Hoffman Estates case is the technique of marketing that clearly demonstrates the seller knows the buyer intends to use the items with illegal drugs and markets accordingly.

Appellee summarizes the paraphernalia cases and states at page 2 of his brief:

> "The derivative contraband/per se contraband distinction has been the conceptual underpinning of all laws which have attempted to attach penalties for the possession of instrumentalities of crime. Traditionally, the *criminalization* of 'paraphernalia' has relied upon this distinction, and 'paraphernalia' laws have historically been enforced only in one of two limited circumstances: either where an object is determined to be intrinsically well-suited for use in crime, having no significant lawful use and being readily distinguishable from objects not inherently sinister; or, where an object, otherwise lawful, has been found in an actual association with ongoing or consummated criminal activity." (Emphasis added)

The issue for this Court to determine is whether a *Danovitz* display is sufficient *nexus* to determine that such items "more likely than not" will be used with illegal drugs—the actual association with criminal activity.

The Village's ordinance is not "criminalization" but licensing. There can be no reasonable doubt in the mind of Appellant that a person of common experience or a retailer of "tobacco accessories" or a United States District Court Judge or a United States Supreme Court Justice who walks into Flipside

or any "headshop" can come to any other logical conclusion but that the displayed items are marketed, displayed and offered in such a mode to encourage the use and be used with illegal drugs and are therefore derivative items subject to licensing.

III. The Merchant's State of Mind Is Relevant.

Appellee Flipside argues that the Village's "designed for use" and "marketed for use" phrases are not related to the merchant's state of mind (Appellee's Brief, p. 42 et. seq.). A July 17, 1981 opinion of the United States District Court for the Southern District in New York published only recently contains an illuminating discussion on that issue wherein the cases of precedent as cited in the Briefs herein and two theories in regard to the issue of intent in paraphernalia cases are analyzed. The case is *Franza* v. *Carey*, 518 F. Supp. 324 (S. D., N. Y.—1981) wherein the New York "Model Act" was tested for constitutionality. It differs from the DEA "Model Act" in that penalties are civil, guidelines for definition of paraphernalia are omitted, advertisement prohibitions are omitted, special violations for minors are omitted and it defines the violation on the bases of *apparent* intent rather than actual knowledge. It is this last point that is discussed at pages 333-338.

That Court's current and pertinent discussion is attached as an Appendix herein. The opinion that " 'designed for the purpose' refers to the subjective intent of the alleged violator rather than to the physical characteristics of a particular item", 518 F. Supp. at 335, is precisely the point this Appellant has argued should be the test. In the Hoffman Estates ordinance, only the retailer can possibly be in violation as no presumed intent is placed on the purchaser or possessor. The New York statute was held unconstitutionally vague because although paraphernalia was properly defined by the retailer's state of mind, a possessor could be found guilty without reference to

said possessor's state of mind. Such would not be the case herein as the ordinance is limited to the merchant only.

Another excellent discussion of "intent" was made in *Gasser* v. *Morgan*, 498 F. Supp. 1154 (N. D., Ala.—1980) where the Court said it may imply specific *mens rea* even in the absence of any expression of intent.

They said at 498 F. Supp. 1163:

> "Merely designing, marketing, or selling the item is not sufficient to make it 'drug related' under the statute. Something in addition to doing one of those physical acts is required, i.e., the physical acts must be done for a bad purpose. A bad purpose is a mental element. The bad purpose required is that the items be useful primarily for taking, concealing, etc., illegal drugs. When a bad purpose must be proved before a person can be convicted of a crime, a statute is said to require a specific intent. The criminal purpose in the Alabama statute is akin to criminal solicitation, and it involves the glamorization, facilitation and encouragement of drug use."

The Hoffman Estates ordinance defines the "use" that the items are designed for or marketed for as a "use" with illegal drugs which is the bad purpose to which *Gasser* addresses as the basis for implied intent.

Another July, 1981 case dealt with intent. It was *Lady Ann's Oddities, Inc.* v. *Macy*, 519 F. Supp. 1140 (W. D., Okla.—1981). The Court considered and rejected some of the same cases cited by Appellee in their Brief to support the argument that the Hoffman Estates ordinance is a strict liability system and the merchant's state of mind is irrelevant. These common cases include *Record Revolution No. 6* v. *City of Parma*, 638 F. 2d 916 (C. A. 6th—1980); *NORML* v. *Sendak*, TH 75-142-C (S. D., Ind.—1980—Appendix of unreported decisions—37a). The Court found a "responsibility to give the statute a constitutional construction if possible" 519 F. Supp. at

1149. Further, they found that "designed for" refers to intent, not structure.

A California Appellate Court ruled a paraphernalia sales ban to minors constitutional and its language sums up the interconnection for the presumptive intent and nexus arguments very well. They said in *Music Plus Four, Inc.* v. *Barnet*, 170 Cal. Rptr. 419 (Cal. App.—1980) as follows:

> "A teaspoon in a room displaying housewares could not reasonably be found to be displayed for the purpose of sale for consuming drugs or narcotics. Conversely, a teaspoon in a record store at least suggests that the display is for sale for some purpose other than eating. Moreover, the display of a teaspoon along with water pipes, roach clips, and cigarette papers specifically designed for smoking marijuana, leaves no doubt about the purpose for which the displayed items are offered for sale." 170 Cal. Rptr. at 428.

This is the simple and logical argument the Village has made throughout the proceedings. The ordinance was carefully drawn to avoid First Amendment issues, transfer of intent issues, and vague definitional issues. It may well lack perfect precision but all this Court requires is that the language convey sufficient warning of the proscribed conduct.

CONCLUSION

The Judgment of the Seventh Circuit Court of Appeals, insofar as it reversed the decision of the United States District Court, should be reversed.

Respectfully submitted,

RICHARD N. WILLIAMS
Village Attorney
1200 North Gannon Drive
Hoffman Estates, IL 60196
(312) 885-8110

November, 1981

APPENDIX

***FRANZA v. CAREY*, 518 F. SUPP. 324 (S.D.N.Y.—1981) pp. 334-338.**

Therefore, in the context of the present case, due process requires that the Statute (1) make reasonably clear to persons affected what conduct constitutes a violation, and (2) provide sufficient enforcement standards to prevent arbitrary and discriminatory enforcement. *See The Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates, supra,* 639 F.2d at 377-79, 383; *Housworth v. Glisson, supra,* 485 F.Supp. at 36-38.

With the above principles in mind, the Court turns to plaintiffs' vagueness arguments. Plaintiffs contend that the "designed for the purpose" language in section 850(2) is impermissibly vague since that phrase refers to unspecified physical characteristics of an item or the intended purpose of its designer or manufacturer. Defendants, however, contend that the words "designed" and "purpose" are equivalent to "intent" and therefore that drug-related paraphernalia is defined by the alleged violator's intent for the item to be used for one of the drug-related purposes enumerated in section 850(2). They further argue that this scienter requirement provides both an ascertainable standard of liability and fair notice to those affected by the Statute of the prohibited conduct.

The Court agrees that a statute which is otherwise vague may be saved by the inclusion of such a scienter or *mens rea* requirement. *See United States v. International Minerals & Chemical Corp.*, 402 U.S. 558, 91 S.Ct. 1697, 29 L.Ed.2d 178 (1971); *United States v. National Dairy Products Corp.*, 372 U.S. 29, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963); *Boyce Motor Lines, Inc. v. United States,* 342 U.S. 337, 72 S.Ct. 329, 96 L.Ed. 367 (1952); *Record Revolution, supra,* 638 F.2d at 934.—Moreover, a statute need not use the word "intent" since knowledge as an element of the violation may be deemed the equivalent of intent. *Brache v. County of Westchester, supra,* 507 F.Supp. at 575; *Gasser v. Morgan,* 498 F.Supp. 1154, 1159 (N.D.Ala.1980). Therefore, the Court must determine whether

the "designed for the purpose" definition indeed creates such a scienter requirement when considered together with the "circumstances evincing knowledge" standard of section 851.

Courts that have considered the Model Act's similar "designed for use" language are divided as to its constitutionality. Some courts, having determined that "designed" refers to the physical characteristics of an item, have found the definition impermissibly vague since it does not include specific design characteristics that distinguish drug-related from non-drug-related items. *See, e. g., Record Revolution, supra,* 638 F.2d at 930; *Weiler v. Carpenter, supra,* 507 F.Supp. at 843. *See also The Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates, supra,* 639 F.2d at 380-81. Other courts adopt the subjective, intentional sense of the word "designed." *See, e. g., The Casbah, Inc. v. Thone,* 651 F.2d 551, at 560 (8th Cir. 1981); *Brache v. County of Westchester, supra,* 507 F.Supp. at 577; *New England Accessories Trade Ass'n v. Browne, supra,* 502 F.Supp. at 1251; *Mid-Atlantic Accessories Trade Ass'n v. Maryland, supra,* 500 F.Supp. at 845; *Delaware Accessories Trade Ass'n v. Gebelein,* 497 F.Supp. 289 (D.Del. 1980).

The reasoning of two decisions is illustrative of the basis for these different opinions. In *Record Revolution,* the Sixth Circuit considered the constitutionality of three local ordinances which were almost identical to the Model Act. *See* 638 F.2d at 921-22. In discussing plaintiffs' vagueness challenge, the Court of Appeals found that the statutory terms "used" or "intended for use" are not vague or overbroad. *Id.* at 929. The Court, however, reached the opposite conclusion with respect to the phrase "designed for use":

> "The term 'designed' could signify only devices that have no use or function other than as a means to ingest the controlled substance. Alternatively, 'designed' could include any devices that have a legitimate function but could be used for ingestion of drugs. That is, the term 'designed' could sweep into the

> definition of paraphernalia any device that could be altered from its normal function to become a makeshift drug device, such as a paper clip, tie bar, hand mirror, spoon, or piece of aluminum foil. . . ."
>
> Vagueness enters in our case once the ordinances begin to define drug paraphernalia in terms of the primary adaption or dominant purpose of the design. Then the definition begins to depend upon the ingenuity or purpose of the purchaser rather than the seller and upon the current practices of the clandestine society of drug users.
>
> The major ambiguity in defining drug paraphernalia in terms of the "design" of items is the lack of any design characteristics that distinguish lawful purposes from unlawful purposes. The type of object that can become, or be used as, drug paraphernalia is limited only by the imagination of the user. The record in our cases established the absence of any unique design characteristics.

Id. at 930-31 (citations and footnote omitted) (quoting *Indiana Chapter, NORML, Inc. v. Sendak*, No. TH 75-142-C, slip op. at 13 (S.D. Ind. Feb. 4, 1980) (3-judge district court), *vacated as moot at the time of appeal*, No. 80-1305 (7th Cir. July 22, 1980)).

The district court in *Mid-Atlantic Accessories Trade Association v. Maryland*, however, gave a contrary interpretation to the same language in the Model Act:

> "Design" connotes an intentional act as well as an objective set of characteristics. When considered in the context of this statute, it is clear that it is the subjective, intentional sense in which "designed" is used.
>
> The fact that "designed for use" and "intended for use" are used in the disjunctive throughout the Act does not necessarily indicate that each of the two phrases means something entirely different. Rather, it is apparent from a reading of the Act in its entirety that all three verbs (i. e. used, designed and intended) were included in the definition of drug paraphernalia so that the terms would be applicable to all the kinds of conduct barred in the Act's substantive sections. A seller will "intend" an item for use,

while a manufacturer is more likely to "design" an item for use, and a user will simply "use" the item.

500 F.Supp. at 844-45.[16]

Having carefully considered the reasoning of both interpretations as well as the distinctive features of the Statute when compared to the Model Act, the Court finds that "designed for the purpose" refers to the subjective intent of the alleged violator rather than to the physical characteristics of a particular item. Even though scienter requirements are not as prevalent in civil statutes as in criminal enactments and section 850 omits the fourteen enforcement guidelines that clearly focus upon the intent of the alleged violator, the Statute's definition of drug-related paraphernalia is obviously adapted from the Model Act. Therefore, the following comments of the Model Act's drafters are relevant in determining the intended meaning of the definition adopted by the New York legislature:

---

[16] Judge Robinson subscribed to a similar interpretation in *The Casbah, Inc. v. Thone,* 512 F.Supp. 474 (D.Neb.1980), *rev'd in part on other grounds,* 651 F.2d 551 (8th Cir. 1981):

> "Designed for use" . . . refers not to the physical characteristics of an object, but to the subjective intent or plan of the person controlling the object. The whole tenor of the statute makes clear that any object, *depending upon its use,* can be drug paraphernalia. In fact, section two of the statute sets out fourteen factors which are to be considered in determining if any given object is paraphernalia; those factors focus not on the physical features of the suspected item but on the context in which the item is found. The factors are an aid in determining whether a person "designed" the object as paraphernalia. The physical properties of an item may not offer a clue about its illicit use. As the court in *Delaware Accessories Trade Assn. v. Gebelein,* [497 F.Supp. 289, 291] (D.Del.1980) said "the statute itself indicates that 'designed for use' refers not to structure but to intent." In short, when "designed for use" is integrated into the statute it is not vague nor even easily succeptible to misunderstanding.

At 482. *See generally* Note, *Anti-Drug Paraphernalia Laws: Void for Vagueness?* 61 B.U. L.Rev. 453 (1981).

> To insure that innocently possessed objects are not classified as drug paraphernalia, Article I makes the knowledge or criminal intent of the person in control of an object a key element of the definition. Needless to say, inanimate objects are neither "good" or "bad," neither "lawful" nor "unlawful." Inanimate objects do not commit crimes. But, when an object is controlled by people who use it illegally, or who intend to use it illegally, or who design or adapt it for illegal use, the object can be subject to control and the people subjected to prosecution. . . .
>
> Consider the application of Article I to a spoon, a hypodermic syringe, and a length of surgical tubing. Each object has legitimate uses in the community. None is specifically designed for illegal use. Thus, when these objects are manufactured, delivered and possessed in lawful commerce, they are not considered paraphernalia. But, if these same objects are assembled and used by an addict to illegally melt heroin and inject it into his body, they become drug paraphernalia. . . .
>
> Actual use of an object to produce, package, store, test or use illicit drugs need not always be shown. An object is considered to be drug paraphernalia whenever the person in control intends it for use with illicit drugs. . . . It should be noted that the person in immediate control of an object need not intend to use it personally in connection with drugs. It is enough if he holds the object with the intent to make it available to persons whom he knows will use it illegally. . . .

Comments at 6-7, Model Drug Paraphernalia Act (August, 1979) (citations omitted).

Although in the context of the Model Act "designed" may have been intended to refer to the subjective intent of a manufacturer of drug paraphernalia,[17] in the context of the

---

[17] The Court recognizes that portions of the comments to the Model Act could be relied upon to support other interpretations of the phrase "designed for use":

> Objects whose sole, or at least dominant purpose is to produce, package, store, test or use illicit drugs are considered to

(Footnote continued on following page)

Statute, which does not seek directly to regulate the activities of manufacturers, the conclusion that "designed for the purpose" refers to the subjective intent of the person charged with a violation is consistent with the ordinary meaning of "designed."[18] Moreover, section 850 does not utilize "designed for the purpose" in the disjunctive with "intended for the purpose" or "intended to be used," which might have suggested that "designed" was used in a sense other than referring to subjective intent. This interpretation is consistent with a prior version of Article 39 which defined drug-related paraphernalia as items "used or intended to be used" for one of a number of drug-related purposes. *See* 1980 N.Y. Laws, c. 811, § 850. Similarly, Governor Carey's statements upon signing the bill creating Article 39 indicate that the legislature considered the intent of the person charged to be a critical element:

> These bills would add a new Article 39 to the General Business Law to prohibit the possession and sale of

---

(Footnote continued from preceding page)

> be "designed" for such use. A rebuttable presumption exists that these objects are intended for use for the purpose for which they are designed. *See Israel v. United States*, 63 F.2d 345 (3rd Cir. 1933). As such, they are presumed to be drug paraphernalia. Isomerization devices designed for use in increasing the THC content of marihuana provide a good example.

Comments at 7-8, Model Drug Paraphernalia Act (August 1979). Similarly, one of the state's enforcement officers, David A. Solomon, Director of the Division of Food & Drug Protection of the New York State Department of Health, at times discussed "designed" in terms of the designer's intention or the design characteristics of an item although recognizing that the intended purpose of the individual charged is an element of the definition of drug paraphernalia. *See* Transcript of Proceedings, *Brache v. Carey* at 46, 94-95. 80 Civ. 4311 (JMC) (Dec. 10, 11, 12, 1980) [hereinafter "R"]. The Court, however, is not bound by Solomon's interpretation of the statutory language. *World Imports, Inc. v. Woodbridge Township, supra*, 493 F.Supp. at 431.

[18] "Designed" is defined as "made as done by design; intended; planned." *See* The Random House College Dictionary (1973 ed.).

> paraphernalia *intended to be used* for growing, manufacturing, ingesting or enhancing the use of controlled substances or marijuana.
>
> . . .
>
> In order to meet constitutional standards, the legislation seeks not to regulate mere possession or sale of such paraphernalia, but rather is directed at possession and sale thereof with *the intention that such items be used for a drug-related purpose.* Violations would result in civil sanctions, including forfeiture of the violator's license to do business and imposition of a penalty of between $1,000 and $10,000.

Executive Memorandum on Approving 1980 N.Y. Laws, cs. 811 and 812 (June 30, 1980) (emphasis added). Having found that the phrase "designed for the purpose" is used in the subjective, intentional sense, the Court concludes there is no merit to plaintiffs' argument that the definition of drug-related paraphernalia refers to the "design" or intent of a remote manufacturer, seller or purchaser rather than the individual or entity charged with a violation. *See Record Revolution, supra,* 638 F.2d at 928-29; *New England Accessories Trade Ass'n v. Browne, supra,* 502 F.Supp. at 1251; *Mid-Atlantic Accessories Trade Ass'n v. Maryland, supra,* 500 F.Supp. at 844.[19] Given the

---

[19] In *Hejira Corp. v. MacFarlane,* ____ F.2d ____, No. 80-2062 (10th Cir. May 5, 1981), the Tenth Circuit considered the constitutionality of a drug paraphernalia statute that defines paraphernalia as an item "primarily adapted, designed and intended for" one of four drug-related purposes. The statute also contains eleven factors for courts to consider in determining whether an item is drug paraphernalia, which were culled from the fourteen enforcement guidelines contained in the Model Act. The substantive criminal offenses prohibit both the possession of paraphernalia with intent to use it in violation of the law and the manufacture, sale or delivery of drug paraphernalia with intent that the item be used as drug paraphernalia.

The district court found the statute vague on its face because the phrase "primarily adapted, designed and intended" considered con-

(Footnote continued on following page)

fact that many forms of drug paraphernalia have legitimate as well as drug-related uses, the Court further concludes that it

(Footnote continued from preceding page)

junctively, failed to give an individual of ordinary intelligence an opportunity to know what is prohibited and because the statute failed to provide that enforcement officers as well as the courts should consider the eleven enforcement factors. The district court, therefore, found a danger of arbitrary and discriminatory enforcement since the statute allowed police too much discretion in enforcement.

The Tenth Circuit reversed, finding that although the district court correctly concluded that the words "primarily adapted, designed and intended" had to be considered conjunctively, the definition could be saved by severing the word "adapted" which the court found inconsistent with the terms "designed" and "intended." The court of appeals discussed the meanings given to the term "designed" by courts considering the Model Act. Although the court appeared to conclude that "designed" referred to the subjective intent of an individual rather than to the physical characteristics of the item and found that "intended" referred to the subjective intent of the individual charged with the offense, it declined to decide whether "designed" also referred to the intent of the individual charged. The court reasoned that since the phrase "primarily designed and intended" must be considered conjunctively, the subjective intent of the alleged violator is an element of the definition of paraphernalia regardless of the interpretation the state courts give to the term "designed." In addition, the Tenth Circuit found that the alleged violator's subjective intent that the item be used for a drug-related purpose is an element of the substantive offenses, and that the eleven enforcement factors were part of the definition of paraphernalia and provided sufficient guidance to law enforcement officers in objectively determining what items constitute drug paraphernalia.

The Court agrees with the Tenth Circuit that the definition of drug paraphernalia must provide fair notice to those affected by making the subjective intent of the individual charged an element of the definition as well as by including objective standards to guide enforcement officers in assessing whether a particular item is drug paraphernalia. The Court, however, does not share the Tenth Circuit's uncertainty regarding whether "designed" refers to the intent of the individual charged. The Court finds that "designed," like "intended," refers to the intent of the person charged. The testimony

(Footnote continued on following page)

would be futile to attempt to define drug paraphernalia by reference to the specific physical attributes of the item. Therefore, the Court perceives no constitutional impediment to defining drug paraphernalia in terms of the alleged violator's subjective intent that the item be used for a drug-related purpose since the individual is no doubt aware of his own intentions and thus has reasonable notice that his conduct falls within the prohibition of the Statute.[20]

(Footnote continued from preceding page)

of enforcement officer Solomon in this regard is consistent with the Court's conclusion. Solomon testified that he would consider the intentions of a design or purchaser of an item, only if communicated to the seller, as relevant evidence in determining the seller's intent. *See* R. at 92-93.

[20] Even when the definition of drug paraphernalia incorporates such a scienter requirement, however, to prevent arbitrary enforcement the legislation must include objective enforcement guidelines by which enforcement officers can assess the subjective intent of the alleged violator. *See Hejira Corp. v. MacFarlane, supra.*